United States Court of Appeals

for the Second Circuit

APPENDIX

76-1082 B

To be argued by
JONATHAN J. SILBERMANN P/S

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

-against-

WILLIE MAE McGIRTH,

Defendant-Appellant.

Docket No. 76-1082

APPENDIX TO APPELLANT'S BRIEF

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

WILLIAM J. GALLAGHER, ESQ.,
THE LEGAL AID SOCIETY,
Attorney for Appellant
WILLIE MAE McGIRTH
FEDERAL DEFENDER SERVICES UNIT
509 United States Court House
Foley Square
New York, New York 10007
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JONATHAN J. SILBERMANN,
Of Counsel.

PAGINATION AS IN ORIGINAL COPY

APPEAL

Form No. 100

CRIMINAL DOCKET

75CR 462

COSTANTINO

TITLE OF CASE

THE UNITED STATES

vs.

WILLIE MAE Mc GURTH

ATTORNEYS

For U. S.: CUNNINGHA

For Defendant:

Did embezzle monies (postal service employee)

ABSTRACT OF COSTS	AMOUNT	
Fine,	490	00
Clerk,		
Marshal,		
Attorney,		
Commissioner's Court,		
Witnesses,		

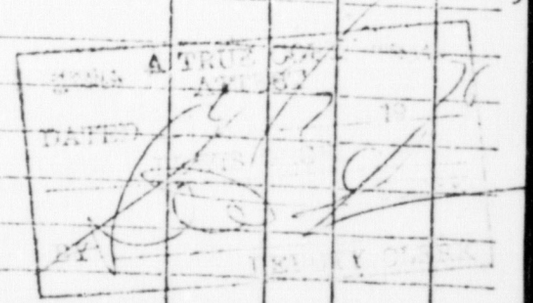
CASH RECEIVED AND DISBURSED

DATE	NAME	RECEIVED	DIS
2-20-76	Notice of Appeal (no fee)		

DATE	PROCEEDINGS
6-3-75	Before JUDD, J - Indictment filed
6-10-75	Before COSTANTINO J - case called - deft & counsel S.Chrein of Legal Aid present - deft waives reading of the indictment and pleads not guilty - adjd to Sept. 22, 1975 for trial.
6/13/75	Notice of readiness for trial filed
7/29/75	75 M 614 inserted in CR file.
9-22-75	Before COSTANTINO J - case called - deft & atty present - adjd to Nov. 17, 1975 for trial
10/15/75	Notice of motion to suppress filed ret. 11/17/75
11/18/75	Before COSTANTINO,J.- Case called- Deft and counsel present- suppres hearing ordered and begun-hearing concluded- motion to suppress deni case adjd to 11/19/75 at 10:00 A.M. for trial
11-19-75	Before COSTANTINO J - case called - deft & atty S.Chrein of Legal Ai

75CR 462

DATE	PROCEEDINGS	CLERK'S FEES PLAINTIFF	CLERK'S FEES DEFENDANT
	present - Trial ordered and BEGUN - Jurors selected and sworn - Trial contd to Nov. 20, 1975.		
11/20/75	Before COSTANTINO,J.- Case called- deft and counsel present- Trial resume trail contd to 11/21/75 at 10:00 A.M.		
11-21-75	Before COSTANTINO J - case called - trial resumed - deft & atty S.Chrein present - jury returns at 6:20 PM and renders a verdict of guilty - jury polled and discharged - trial concluded - motion to set aside verdic motion denied - sentence adjd without date - bail contd		
11-24-75	By Costantino J - Order of Sustenance filed		
1-30-76	Before COSTANTINO, J. - Case called. Deft not present/present XXXXXXX counsel present- Adj'd to 2-20-76 at 10:30 A.M. for sentence.		
2-20-76	Before COSTANTINO J - case called - deft & counsel S.Chrein present- deft sentenced to imprisonment for 3 years. Execution of sentence is suspended and the deft is placed on probation for 3 years. Deft to paya fine of $490 to be paid within one year. Stay of execution of probationary period and payment of fine until the conclusion of appeal. Notice of Appeal to be filed in forma pauperis . Bail contd.		
2-20-76	Judgment & Commitment and Order of Probation filed - certified copies to Marshal & Probation.		
2-20-76	Notice of Appeal filed (no fee)		
2-20-76	Docket entries and duplicate of Notice of Appeal mailed to the Court of Appeals.		
3/8/76	Copy of Order received from court of appeals that record be filed on or about 3/19/76		
3-17-76	Stenographers transcript dated 2-20-76 filed.		
3-22-76	Stenographers transcript dated 11-19-75 filed		
3-31-76	Stenographers transcript dated Nov. 20, 1975 filed		
4-2-76	3Stenographers transcript dated Nov. 17, 1975 filed; one dated Nov. 18, 1975 filed and one dated Nov. 21, 1975 filed.		
4/7/76	Record on appeal certified and ~~xxxxxxx~~ handed to Joan Gill for delivery to court of appeals		



RJD:MCC:gc
F. #751,561

75CR 402

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - - x

UNITED STATES OF AMERICA :

- against - : Cr. No.
(T. 18, U.S.C. §1711

WILLIE MAE MC GIRTH, :

Defendant. :

- - - - - - - - - - - - - - - - - - x

THE GRAND JURY CHARGES:

On or about and between January 3, 1975 and April 1, 1975, both dates being approximate and inclusive, within the Eastern District of New York the defendant WILLIE MAE MC GIRTH, being a United States Postal Service employee, did wilfully, knowingly and unlawfully convert to her own use, without authorization by law, the sum of approximately Four Hundred and Seventy Dollars ($470.00) which had come into her hands and under her control in the execution of her employment and service as such employee. (Title 18, United States Code, Section 1711).

Arthur E. Kurn
FOREMAN

David G. Trager
DAVID G. TRAGER
United States Attorney
Eastern District of New York

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THE COURT: Mr. Foreman and ladies and gentlemen of the jury:

Now that you have heard the evidence and the argument, it becomes my duty to give you the instructions of the Court as to the law applicable to this case.

It is your duty as jurors to follow the law as stated in the instructions of the Court, and to apply the rules of law so given to the facts as you find them from the evidence in the case.

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You are not to single out one instruction alone as stating the law, but must consider the instructions as a whole.

Neither are you to be concerned with the wisdom of any rule of law stated by the Court. Regardless of any opinion you may have as to what the law ought to be, it would be a violation of your sworn duty to base a verdict upon any other view of the law than that given in the instructions of the Court; just as it would be a violation of your sworn duty, as judges of the facts, to base a verdict upon anything but the evidence in the case.

Justice through trial by jury must always depend upon the willingness of each individual juror to seek the truth as to the facts from the same evidence presented to all the jurors; and to arrive at a verdict by applying

all the same rules of law, as given in the instructions of the Court.

You have been chosen and sworn as jurors in this case to try the issues of fact presented by the allegations of the indictment and the denial made by the "Not-Guilty" plea of the accused. You are to perform this duty without bias or prejudice as to any party. The law does not permit jurors to be governed by sympathy, prejudice or bias. Both the accused and the public expect that you will carefully and impartially consider all the evidence in the case, follow the law as stated by the Court and reach a just verdict, regardless of the consequences.

I will not review the facts in this case for you because I am certain that with summations by the attorneys there is no need for the Court to review the facts.

The attorneys have been permitted by the Court and by the rules to make opening statements and summations to you. Under no circumstances are the statements they have made by way of opening or by way of summation to be taken as evidence. However, the Court and the law does permit you to take the arguments that they have proffered before you and weigh those arguments. And if you agree with what they have said on either side of the case, you may use those arguments in your deliberations and in discussing the case with each

other, and try to convince one another as to what the final determination shall be with reference to the deliberations at hand.

If you feel that the arguments are not commensurate with the testimony and the proof in the case, you may disregard them. The arguments are not evidence. You need not weigh them. However, there are times when the arguments of the attorneys will give you an insight as to something you may have missed, and you may discuss that portion of it if you so desire.

As I have already instructed you, the Court will be the judge of the law. You may recall that some motions were argued at side bar. That was not for the purpose of keeping any of the proof from you, but were matters of law that were discussed between the attorneys and the Court itself and should not have come before you. In any event, if you feel that you have discovered by some stretch of your imagination what this Court thinks as to either some of the testimony or the case itself, you should remove that from your mind because I tell you here and now I have come to no conclusion in this case nor have I indicated to you in any way whatsoever what my feeling is with reference to the facts in the case or with reference to the guilt or innocence of the defendant. That is your province and your job. You should not try to

weigh what you believe the Court's impression may be.

You must understand that the lawyers who appear before you are advocates. They are advocating the best case they can for the parties they represent and they have a right to exercise as much forcefulness as they desire in their questioning or otherwise in presenting their case. I say this because this is within the framework of the ordinary trial.

During my precharge I told you among other things that the questions asked by the attorneys are never to be considered as evidence even though the question may contain a statement of evidence. You are reminded that only the answer to the question is evidence, if, of course, the question was answered.

Of course, you know by this time that this case has come before you by way of an indictment presented by a Grand Jury sitting in this Eastern District. That indictment charges the defendant with one count. I shall now read it to you. Remember, the indictment is merely an accusation, merely a piece of paper. It is not evidence and is not proof of anything.

On or about and between January 3, 1975 and April 1, 1975, both dates being approximate and inclusive, within the Eastern District of New York the defendant Willie

Mae McGirth, being a United States Postal Service employee, did wilfully, knowingly and unlawfully convert to her own use, without authorization by law, the sum of approximately Four Hundred and Seventy Dollars ($470.00) which had come into her hands and under her control in the execution of her employment and service as such employee.

The count charges violation of Title 18, United States Code, Section 1711.

Title 18 United States Code, Section 1711 provides in relevant part as follows:

Whoever, being a Postal Service officer or employee, loans, uses, pledges, hypothecates, or converts to his own use, or deposits in any bank, or exchanges for other funds or property, except as authorized by law, any money or property coming into his hands or under his control in any manner, in the execution or under color of his office, employment, or service, whether or not the same shall be the money or property of the United States; or fails or refuses to remit to or deposit in the Treasury of the United States or in a designated depository, or to account for or turn over to the proper officer or agent, any such money or property, when required to do so by law or the regulations of the Postal Service, or upon demand or order of the Postal Service, either directly or through a duly authorized officer or agent, is

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guilty of embezzlement.

To "embezzle" means wilfully to take, or convert to one's own use, the property of another, which came into the wrongdoer's possession lawfully, by virtue of his office or employment or position of trust.

There are three essential elements to the crime of misappropriation of postal funds, Title 18 U.S.C. Section 1711.

First, that at the time and place alleged the defendant was an employee of the Postal Service;

Second, that the money came into the defendant's hands and under her control in the execution or under color of her employment.

Third, that the defendant knowingly and unlawfully converted the money to her own use without authorization by law.

The burden is upon the prosecution to prove beyond a reasonable doubt every essential element of the crime charged.

The gist of the offense is the knowing and wilfull taking or keeping of money with the specific intent to misappropriate or misapply it.

The crime charged in this case is a serious crime which requires proof of specific intent before the

defendant can be convicted. Specific intent, as the term implies, means more than the general intent to commit the act. To establish specific intent the Government must prove that the defendant knowingly did an act which the law forbids, or knowingly failed to do an act which the law requires, purposely intending to violate the law. Such intent may be determined from all the facts and circumstances surrounding the case.

The charges in this indictment require the Government to prove that the defendant knowingly and wilfully performed acts in violation of law. The Court will therefore define the words knowingly and wilfully.

An act is done "knowingly" if done voluntarily and intentionally, and not because of mistake or accident or other innocent reason.

The purpose of adding the word "knowingly" was to insure that no one would be convicted for an act done because of mistake, or accident or other innocent reason.

An act is done "wilfully" if done voluntarily and intentionally, and with specific intent to do something the law forbids; that is to say, with bad purpose either to disobey or to disregard the law.

There are two types of evidence from which you may find the truth as to the facts of a case -- direct

and circumstantial evidence. Direct evidence is the testimony of one who asserts actual knowledge of a fact, such as an eyewitness; circumstantial evidence is proof of a chain of facts and circumstances indicating the guilt or innocence of a defendant. The law makes no distinction between the weight to be given to either direct or circumstantial evidence. Nor is a greater degree of certainty required of circumstantial evidence than of direct evidence. You should weigh all the evidence in the case. After weighing all the evidence, if you are not convinced of the guilt of the defendant beyond a reasonable doubt, you must find her not guilty.

A defendant is presumed innocent of the crime. Thus the defendant, although accused, begins the trial with a clean slate and with no evidence against him, and the law permits nothing but legal evidence to be presented before a jury to be considered in support of any charge against the accused. So the presumption of innocence alone is sufficient to acquit a defendant unless you, the jury, are satisfied beyond a reasonable doubt of the defendant's guilt after careful and impartial consideration of all the evidence in the case.

It is not required that the Government prove guilt beyond all possible doubt. The test is one of reasonable doubt, and reasonable doubt is doubt based upon reason and

common sense, the kind of doubt that would make a reasonable person hesitate to act. Proof beyond a reasonable doubt must, therefore, be proof of such a convincing character that you would be willing to rely and act upon it unhesitatingly in the most important of your own affairs.

You, the jury, will remember that a defendant is never to be convicted on mere suspicion or conjecture. The burden is always upon the prosecution to prove guilt beyond a reasonable doubt. This burden never shifts to a defendant. The law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence. If the jury views the evidence in the case as reasonably permitting either of two conclusions, one of innocence, the other of guilt, you, the jury, must, of course, adopt the conclusion of innocence.

A reasonable doubt may arise not only from the evidence produced, but also from a lack of evidence. Since the burden is upon the prosecution to prove the accused guilty beyond a reasonable doubt of every essential element of the crime charged, a defendant has the right to rely upon failure of the prosecution to establish such proof.

I have said that the defendant may be proven guilty either by direct or circumstantial evidence. I have said that direct evidence is the testimony of one who asserts

actual knowledge of a fact, such as an eyewitness. Also circumstantial evidence is proof of a chain of facts and circumstances indicating the guilt or innocence of a defendant. You, the jury, may make common sense inferences from the proven facts.

It is not necessary that all inferences drawn from the facts in evidence be consistent only with guilt and inconsistent with every reasonable hypothesis of innocence. The test is one of reasonable doubt, and should be based upon all the evidence, the testimony of the witnesses, the documents offered into evidence and the reasonable inferences which can be drawn from the proven facts.

An inference is a deduction or conclusion which reason and common sense lead the jury to draw from the facts which have been proved. You are to consider only the evidence in the case. But in your consideration of the evidence you are not limited to the bald statements of the witnesses. On the contrary, you are permitted to draw, from the facts which you find have been proved, such reasonable inferences as seem justified in the light of your own experience.

Evidence relating to any statement, or admission claimed to have been made or done by a defendant outside of court, and after a crime has been committed, should always be considered with caution and weighed with great care;

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and all such evidence should be disregarded entirely, unless the evidence in the case convinces the jury beyond a reasonable doubt that the statement or act or omission was knowingly made or done.

A statement or admission, is "knowingly" made or done, if done voluntarily and intentionally and not because of mistake or accident or other innocent reason.

In determining whether any statement or admission claimed to have been made by a defendant outside of court, and after a crime has been committed, was knowingly made or done, the jury should consider the age, sex, training, education, occupation, and physical and mental condition of the defendant, and her treatment while in custody or under interrogation, as shown by the evidence in the case; and also all other circumstances in evidence surrounding the making of the statement or admission including whether, before the statement or admission was made or done, the defendant knew or had been told and understood that she was not obligated or required to make or do the statement or admission claimed to have been made or done by her; that any statement or admission which she might make or do could be used against her in court; that she was entitled to the assistance of counsel before making any statement or admission, either oral or in writing and that if she was without money or means to retain counsel

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of her own choice, an attorney would be appointed to advise and represent her free of cost or obligation.

If the evidence in the case does not convince beyond a reasonable doubt that a confession was made voluntarily and intentionally you should disregard it entirely. On the other hand, if the evidence in the case does show beyond a reasonable doubt that a confession was in fact voluntarily and intentionally made by the defendant, you may consider it as evidence.

There is evidence in this case that the defendant participated in the fabrication of a document intended to mislead the investigating authorities.

If you find beyond a reasonable doubt that this document was spurious and that the defendant participated in the making of it, you may consider that fact as probative of the defendant's guilt.

You as jurors are the sole judges of the credibility of the witnesses and the weight their testimony derserves, and it goes without saying that you should scrutinize all the testimony given, the circumstances under which each witness has testified, and every matter in evidence which tends to show whether a witness is worthy of belief. Consider each witness's intelligence, motive and state of mind, and his demeanor and manner while on the stand. Consider the

witness's ability to observe the matters as to which he has testified, and whether he impresses you as having an accurate recollection of these matters. Consider also any relation each witness may bear to either side of the case; the manner in which each witness might be affected by the verdict; and the extent to which, if at all, each witness is either supported or contradicted by other evidence in the case.

Inconsistencies or discrepancies in the testimony of a witness, or between the testimony of different witnesses, may or may not cause the jury to discredit such testimony. Two or more persons witnessing an incident or a transaction may see or hear it differently; and innocent misrecollection, like failure of recollection, is not an uncommon experience.

In weighing the effect of a discrepancy, always consider whether it pertains to a matter of importance or an unimportant detail, and whether the discrepancy results from innocent error or intentional falsehood.

After making your own judgment, you will give the testimony of each witness such credibility, if any, as you may think it deserves.

When a defendant in a case of this kind takes the stand, which she has a perfect right to do, she is subjected to all the obligations of witnesses, and her testimony

is to be treated like the testimony of any other witness; that is to say, it will be for you to say, remembering the substance of her testimony, the manner in which she gave it, her cross-examination, and everything else in the case, whether or not she told the truth. Then again, it is for you to remember, you have a perfect right to do so, the very grave interest the defendant has in the case. As she places herself as a witness, she stands like any other witness.

Every witness's testimony must be weighed as to its truthfulness. If you find any witness lied as to any material fact in the case -- then the law give you certain privileges. One of those privileges is that you have the right to disregard the entire testimony of that witness. If you find, however, that you can sift through that testimony and determine which of the testimony is true and which was false, then the law allows you to take the portions which were true and weigh it and disregard those portions which were false. That again is within your prerogative.

The weight of the evidence is not necessarily determined by the number of witnesses testifying on either side. You should consider all the facts and circumstances in evidence to determine which of the witnesses are worthy of greater credence. You may find that the testimony of a smaller number of witnesses on one side is more credible than

the testimony of a greater number of witnesses on the other side.

You are not obliged to accept testimony, even though the testimony is uncontradicted and the witness is not impeached. You may decide, because of the witness's bearing and demeanor, or because of the inherent improbability of his testimony, or for other reasons sufficient to you, that such testimony is not worthy of belief.

The Government is not required to prove the essential elements of the offense as defined in these instructions by any particular number of witnesses. The testimony of a single witness may be sufficient to convince you beyond a reasonable doubt of the existence of an essential element of the offense charged, if you believe beyond a reasonable doubt that the witness is telling the truth.

There is nothing peculiarly different in the way a jury should consider the evidence in a criminal case, from that in which all reasonable persons treat any question depending upon evidence presented to them. You are expected to use your good sense; consider the evidence in the case for only those purposes for which it has been admitted, and give it a reasonable and fair construction, in the light of your common knowledge of the natural tendencies and inclinations of human beings.

If an accused be proved guilty beyond reasonable doubt, say so. If not so proved guilty, say so.

Keep constantly in mind that it would be a violation of your sworn duty to base a verdict of guilty upon anything other than the evidence in the case; and remember as well that the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence.

In making the factual determination on which your verdict will be based, you may consider only the exhibits which have been admitted in evidence and the testimony of the witnesses as you have heard it in this courtroom.

The punishment provided by law for the offense charged in the indictment is a matter exclusively within the province of the Court, and should never be considered by the jury in any way in arriving at an impartial verdict as to the guilt or innocence of the accused.

If any reference by the Court or counsel to matters of evidence does not coincide with your own recollection, it is your recollection which should control during your deliberations.

Now, in this type of case there must be a unanimous verdict. That means that all twelve of you must agree, and it goes without saying that it becomes incumbent

upon you to listen to one another and to argue out the points among yourselves in order to determine in good conscience whether your fellow jurors' argument is one commensurate with yours or whether at least you can with good conscience agree with him. You have no right to stubbornly and idly sit by and say, "I am not talking to anyone." "I am not going to discuss it," because people with common sense and the ability to reason must communicate, they must communicate their thoughts. So, anything which appears in the record and about which one of you may not agree -- talk it out amongst yourselves and then if you can't agree as to what is in the record, well, you can ask the Court to have that portion of the testimony read back to you.

You may do so by knocking on the door and giving a note in writing to the marshal who will then present it to the Court, and I will then bring you into the courtroom.

The foreman will preside over your deliberations and will be your spokesman here in court.

The form of your verdict shall be -- it is a one count indictment, Mr. Foreman -- We the jury find the defendant guilty or, We the jury find the defendant not guilty.

JUROR NUMBER ONE: Excuse me. Do all fourteen deliberate?

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THE COURT: No, but we have made arrangements for the fourteen of you to go out to lunch.

Do not discuss your deliberations until after you come back from lunch. When you return to the courtroom then the twelve of you will begin your deliberations.

(Whereupon a United States Marshal was sworn by the Clerk of the Court.)

CERTIFICATE OF SERVICE

May 7, 1976

I certify that a copy of this brief and appendix has been mailed to the United States Attorney for the Eastern District of New York.

Nathan J. Silberman